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In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITIONER'S REPLY BRIEF

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1. Reply in support of the proposition that the statute under which Petitioner was ordered deported is unconstitutional.

The Government misunderstands the position of Petitioner with respect to other constitutional issues involving the statute in question. Petitioner does not waive the objections to the constitutionality of the statute based upon freedom of speech, due process of law, and ex post-facto. Each of these issues was timely raised and preserved throughout the proceedings in this case.

While Petitioner recognizes the holdings in the cases of *Galvan v. Press,* 347 U.S. 522 and *Harisiades v. Shaughnessy,* 342 U.S. 580, he does not agree with the doctrines announced by the Court in those cases, and urges that they be overruled.

However, because the Court has not passed upon the Bill of Attainder issue, and because certiorari has been denied to other petitions which requested reconsideration of the issues decided in *Galvan* and *Harisiades,* the stress of Petitioner's brief has been upon the Bill of Attainder issue.

The basic constitutional problem of the power of Congress to banish long-time residents of this country, which underlies the due process issue, has been discussed in the brief of the National Lawyers' Guild tendered *amicus curiae.* Petitioner adopts the position of the Guild as there expressed.

Moreover, the Guild's brief elaborates certain aspects of the question of whether deportation is "punishment." The points made are consistent with Petitioner's argument and are therefore adopted.

Turning to the merits of the Bill of Attainder issue, the Government builds its defense of the act upon a semantic point, namely the definition of the word "punishment."

The Government argues that for an act to be unconstitutional as a Bill of Attainder, it must impose criminal penalties. Deportation, the Government says, is not criminal punishment and therefore the act is not a Bill of Attainder (Br. 29-30).

This line of reasoning involves a basic mistake as to the nature of Bills of Attainder as defined historically. Bills of Attainder or Bills of Pains and Penalties were not necessarily criminal in nature. On the contrary, as was shown in *Ex Parte Garland,* 4 Wall 333, and *Cummings v. Missouri,* 4 Wall 277, as well as the more recent case of *United States v. Lovett,* 328 U.S. 303, such acts might merely involve the deprivation of salary or the impairment of the right to practice a profession.

The Bills of Attainder passed during the aftermath of the American Revolution did not impose criminal punishment, but were rather penalties imposed upon sympathizers of the British king. Indeed, the Bill of Attainder passed by the State of New York in October 1779 inflicted banishment on the former governor of New York, the Earl of Dunmore, and others. It declared that their property was confiscated to the State, and that they were banned from New York under penalty of death should they ever return.

It is clear that had this statute been passed after the enactment of the Federal Constitution, it would have been unlawful as a Bill of Attainder.

The Government argues that the provision for deporting Communist aliens is simply one enactment among many in a long line of legislative actions against specific groups, especially the Chinese and the anarchists (Br. 30).

But it should be pointed out that with respect to the Chinese, they were excluded from the United States, and

subsequent entry was illegal and subject to ejection, rather than to banishment as in this case. Here, there is no challenge to the legality of Petitioner's entry.

Moreover, with respect to anarchists, there has never been an "Anarchist Party." The enactment was one aimed at an ideology rather than "easily ascertainable members of a group." *United States v. Lovett,* 328 U.S. 303, 305.

The Government says that the Congressional action establishes a legislative policy, affirmed by *Harisiades,* that there is sufficient connection between past membership in the Communist Party and present desirability as a resident. In other words, the Government says the alleged membership of Petitioner in the Communist Party in 1937 is in and of itself, as a matter of law, proof that Petitioner's presence in the United States is a threat to its security and that he is undesirable and dangerous.

The absurdity of this statement is apparent. It is reinforced by the fact that no evidence of any misconduct or subversive act or thought was produced at the hearing on Petitioner's deportation. On the contrary, all of the evidence shows that Petitioner has conducted himself properly while within this country and would make a good citizen (Tr. 74).

It is interesting to note that the Government has failed to answer the other contentions of Petitioner in his argument that the act is a Bill of Attainder. Nowhere has the Government refuted the line of reasoning advanced by Petitioner or the authorities on which he relies.

The weakness of the Government's argument is a reflection of the inherent weakness of its position on the constitutionality of this act. It is a virtual admission that the act under which deportation proceedings have been taken against Petitioner is unconstitutional, and the Court should so rule.

2. Reply in support of proposition that the evidence shows that Petitioner's alleged membership in the Communist Party was not a meaningful political association under the rule of Rowoldt v. Perfetto, 355 U.S. 115.

The Government's long discussion of the evidence adduced at the deportation hearing fails to touch the nub of the Petitioner's interpretation of *Rowoldt v. Perfetto.* That is, that in order for an alien to be deported under the act, there must be "substantial and probative" evidence that he was a politically-aware, conscious and active member of the Communist Party after entry.

This level of evidence cannot be satisfied by vague inferences or suppositions. As the Court ruled in *Rowoldt,* a person who joined the Communist Party from sympathy with its economic and social welfare aims is not a person who is a politically active member under the law. Even the Government concedes that its own witnesses characterized Petitioner as not being a Party intellectual but "more interested" in "bread and butter" topics, including unemployment benefits and social security (Tr. 72, 75).

The other charges made against Petitioner are either

so vague as to raise serious doubts as to their meaning, or they can be dismissed because of the obvious lack of veracity of the Government witnesses or the inherent conflict in their testimony.

Contrary to the Government's assertion on page 25 of its Brief that there was no conflict between the testimony on the point of Petitioner's alleged role as a "functionary," the following testimony is pertinent:

QUESTIONS TO WITNESS WILMOT:

"Q. Did he hold any office in the Communist Party, as far as you were aware?

"A. To the best of my recollection, I think he was a functionary in the Albina Group. Secretary, I believe. I am not positive of that. That is my impression." (Tr. 15).

"Q. By functionaries what do you mean? People who performed full time work for the Party and got paid?

"A. Yes. I will say officials from now on. In a sense we were all functionaries." (Tr. 35).

QUESTIONS TO WITNESS KNIPE:

"Q. The question was, was Mr. Mackie a paid Communist Party functionary. Was he paid by the Communist Party?

"A. Not that I know of. I misinterpreted the question.

"Q. Was he a Communist Party functionary to your knowledge?

"A. No." (Tr. 68).

SPECIAL INQUIRY OFFICER TO WITNESS KNIPE:

"Q. By that you mean official of the party?

"A. No, he was not an official of the Party." (Tr. 68).

EXAMINING OFFICER TO WITNESS KNIPE:

"Q. What is your understanding Mr. Knipe as a functionary of the Party to be?

"A. A functionary, to my knowledge, is an active member who holds an office whether it be paid or unpaid, there are paid functionaries in organizations and unpaid functionaries." (Tr. 68).

It is therefore clear that both Wilmot and Knipe were talking about the same thing when they used the term "functionary." One testified that Petitioner was a functionary and secretary of the Albina Group and the other denied it.

Nor is it accurate to say (Br. 20-23) that *Rowoldt* did not alter to some degree the test of membership as defined by *Galvan*. The facts in *Rowoldt* were that the alien had a measure of association with the Communist Party from which a political awareness might be inferred. But inference is not enough under the *Rowoldt* decision. Substantial evidence of political awareness is necessary, and was found to be lacking in *Rowoldt* and is, it seems to us, absent in the case at bar.

Certainly evidence that Petitioner had conversations about "Communist Party matters" (Br. 7, 8, 9), without mention of the specific content of such alleged discussions, is an inadequate basis from which to speculate on Petitioner's political awareness.

The Government's argument has not affected the basic fact that Petitioner, during the period of time involved in this case, was grossly ignorant of Communist history and theory and interested only in economic and welfare activities. If indeed Petitioner was a member of

the Communist Party, that association was so unpolitical and tenuous as to be clearly within the *Rowoldt v. Perfetto* doctrine. On this ground too, Petitioner is entitled to relief.

CONCLUSION

There is insufficient "probative and substantial" evidence of Petitioner's political connection with the Communist Party to form the basis for his deportation. Moreover, the act under which the Government seeks to deport Petitioner is clearly a Bill of Attainder and is therefore unconstitutional.

If this Court does not care to reconsider the other constitutional issues, it may decide the case on one or both of the above points. But on one theory or the other, Petitioner is entitled to relief and respectfully requests the Court to reverse the judgment and dismiss the proceedings instituted against him.

Respectfully submitted,

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